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No. 06-65

Supreme Court, U.S.
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In the Supreme Court of the United States

NATHANIEL RICHMOND
and
STEPHANIE RICHMOND,
Petitioners,

v.

NICHOLAS G. HIGGINS, d/b/a
NICHOLAS G. HIGGINS & ASSOCIATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONER'S REPLY

The debt collector tries to salvage the Eighth Circuit's erroneous conclusions of law by advancing the notions *Heintz* does not apply and the debt collector cannot be held to answer for the creditor's felonious billing practice, even if it occurred. *Heintz*, which involved communications between lawyers engaged in a dispute about the monies due under a contract, is not distinguishable. *Heintz v. Jenkins*, 514 U.S. 291 (1995). Before turning to *Heintz*, the consumers will establish the reality of the felony and briefly touch on why the debt collector's claim that it was just following the creditor's orders is not a viable defense.

I. GENUINE FELONIOUS BILLING PRACTICES

A theme running throughout the consumer's petition is the notion the debt collector engaged in or aided and abetted a felony. The debt collector suggests this notion is fanciful, as the statutory prohibition only applies to "...any service provided to a patient *under a State plan*...". 42 U.S.C. § 1320a-7b(d)(1)(emphasis in Respondent's Brief pg 9). The debt collector claims whether the service was provided under the plan depends on who the hospital chooses to bill. The hospital admitted for treatment a patient whose health insurance presumes the insurer, the State, will be billed. Mo. Code Regs. Ann. tit 13, § 70-4.030(1). The presumption can only be rebutted with a written agreement. *Ibid.* There is no written agreement and, in its absence, the hospital must bill Medicaid. *Ibid.* The patient has no personal responsibility for the bill. *Barney v. Holzer Clinc, Ltd.*, 110 F.3d 1207, 1209-11 (6th Cir. 1997). Regardless of who is billed, for the healthcare provider to charge anyone, the insured, the state or the tortfeasor, more than Medicaid would pay is a felony. 42 U.S.C. § 1320a-7b(d)(1).

The hospital could refuse to admit a person covered by Medicaid. *Barney*, 110 F.3d at 1209-11. However, having

admitted the consumer, the hospital does not enjoy the power to unilaterally change its contract with the State, which contract must past muster with the federal government and to which the consumer is third-party beneficiary. *Ibid.* The first entry on the consumer's bill is his Medicaid number, which is followed by an entry, made on the first business-day following admission, indicating the hospital certified his inpatient treatment with the State authorities. Deposition of Melinda Bowman, pp. 25-33, Exhibit 20 attached to court document 30, the Memorandum in Support of Plaintiff's Motion for Summary Judgment (by local rule, the undisputed facts are attached to the memorandum). As the hospital knew it was treating a Medicaid patient, its only defense was a claim, like that advanced by Arkansas and rejected by this court, that billing the tortfeasor was not covered by Medicaid. *Arkansas Dept. of Health and Human Services v. Ahlborn*, --- U.S. ---, 126 S.Ct. 1752 (2006). The position was untenable from the outset as 42 U.S.C. § 1396a(a)(25)(C) limits the obligation of the patient and any of the patient's financially responsible representatives and 42 U.S.C. § 1320a-7b(d)(1) outlaws charging, without limitation as to whom is billed, more than Medicaid would pay.

II. FOLLOWING ORDERS IS NO DEFENSE NO BONA FIDE ERROR, 1692k(c), DEFENSE

The debt collector claims in part III of its brief that Congress did not choose to impose liability when the collector is just following the creditor's orders. The problem with this notion is that the FDCPA imposes strict liability. It extends to conveying information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C. § 1692a(2). The unacceptable collection practices listed in sections d, e and f extend to *any* conduct designed to harass *anyone*, § 1692d, *any* false representations in connection with *any* debt, § 1692e, and using unfair or unconscionable means

to collect *any* de..., § 1692f. Congress was capable of limiting liability to knowing or reasonably knowable errors when it saw fit. 15 U.S.C. § 1692e(8). If there were any doubt, the Act imposes liability on "...*any* debt collector who fails to comply with *any* provision of this subchapter with respect to *any* person..." except as otherwise stated in § 1692k. 15 U.S.C. § 1692k(a). This is why the Eighth Circuit, along with all the others, have held the FDCPA imposes strict liability. *See Picht v. John R. Hawks Ltd.*, 236 F.3d 446 (8th Cir. 2001). As observed by the Seventh Circuit, "debt collectors may not make false claims, period." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (Cir. 7th 2004)(holding that the bankruptcy code does not pre-empt the FDCPA).

Congress did not demand perfection from professional debt collectors. It set a floor defining groups of conduct wholly unacceptable and otherwise required them to behave in a professional manner. In lieu of creating a self-regulating vocation, Congress enlisted consumers as the oversight committee. It allowed professional debt collectors accused of an abusive practice to plead a *bona fide* error defense. Under the defense, the professional must plead and prove that it has adapted reasonable procedures for avoiding violations of the Act and only through some misadventure did the violation occur. 15 U.S.C. § 1692k(a) & (c). Congress undoubtedly imposed a minor statutory penalty on any debt collector who fell below the minimum professional standard absent a *bona fide* error, when Congress passed the following language:

> (a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--
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> * * *

> (c) Intent. A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C.A. § 1692k. There is no need to explore the subtleties of the *bona fide* error defense in this case, given the facts the debt collector claims are undisputed.

A comparison between *Heintz*, the case the debt collector finds so important, and the facts, the debt collector claims are material and undisputed, shows the debt collector's error. The law firm in *Heintz* had a multi-step vetting process before it filed suit. *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997). In the case at bar, the debt collector regularly collects debts for the hospital. Affidavit of Nicholas G. Higgins, ¶ 6, Exhibit C, attached to court document 27, Statement of Uncontroverted Facts for Defendant Nicholas G. Higgins d/b/a Nicholas G. Higgins & Associates Second Motion for Summary Judgment (Higgins Affidavit). Regardless of how elaborate a procedure a debt collector might construct, as Jenkins did, a professional debt collector should, at the very least, require the creditor's assurances it has no reason to believe collecting the debt will amount to a felony. In this case, the debt collector does not claim it has a procedure to double check the itemized bill it received from the creditor, as compared to *Jenkins*. Higgins Affidavit ¶¶ 7 & 8. The debt collector claims that, even at the late date of filing its second motion for summary judgment, it still did not know whether the consumer was covered by Medicaid. Higgins Affidavit ¶ 12. While such willful ignorance may prevent a criminal prosecution, it also forecloses any possibility the debt collector has a reasonable procedure to avoid misstating the

amount of the debt or any other of a half-dozen provisions of the FDCPA it could violate, when the patient is covered by Medicaid.

III. CONFLICT WITH *HEINTZ*?

The debt collector elects a shotgun approach to its claim the Eight Circuit did not refuse to follow *Heintz* in a case with indistinguishable facts. While the consumers would like to avoid the appearance of tit-for-tat acrimony, they have no choice but to respond to the arguments *seriatum*.

The debt collector claims *Heintz* is distinguishable because a lawyer was hired to collect a deficiency following a foreclosure and, as is born out by the ultimate resolution, the debt collector was exonerated. First, while *Heintz* involved conduct that might not have been covered by the FDCPA, this case involves conduct that is unquestionably within the Act. Second, while the Seventh Circuit refused to hold Heintz to a higher standard because he was a lawyer, the debt collector's notion in the case at bar is that he could meet a lower standard because he is a lawyer, which notion has no merit. *See Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997). The FDCPA regulates the conduct of debt collectors regardless of whether they hold a J.D. or a G.E.D. While two circuit judges ultimately agreed that Heintz committed a *bona fide* error in initially believing the creditor's representation the contract allowed forced placed insurance that included a payment bond,[1] in this case the consumers warned the debt collector it sought money not owed under the contract, cited the contract provision to the debt collector and, unlike the consumers in *Heintz*, they refrained from filing suit until the debt collector ignored the warning. In ignoring the

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[1] All purchase money consumer loans for houses and new cars include force placed "insurance". The problem in Heintz was the bank bought insurance that included coverage in case the consumer defaulted, a payment bond.

warning, the issue on remand will no longer include unintentional mistakes.

The debt collector next claims it was billing a third-party rather than the consumers and, although the consumer knew of the amount billed, it never disputed the charges. This court has already declared a tort settlement is a consumer's property and any notion that asserting a lien on a tort settlement is not an attempt to take the consumer's property is pure hokum. *Arkansas Dept. of Health and Human Services v. Ahlborn*, --- U.S. ---, 126 S.Ct. 172 (2006). The FDCPA does not impose obligations on consumers. Nonetheless, the consumers disputed the charges for the debt and they specifically advised the debt collector the terms of the contract creating the obligation prohibited collecting what the debt collector claimed was owed. They communicated the dispute to the creditor's lawyer, the only person they could.[2] While it is true this case is slightly different than *Heintz*, where the contract was ambiguous and the error was not repeated, in this case the lack of ambiguity in the contract, 42 U.S.C. § 1396a(a)(25)(C), and repeated violation makes the debt collector's conduct actionable, not excusable.

The debt collector claims it is obvious the consumers are disputing a debt. This mirrors the language in the Eighth Circuit's opinion. Neither the opinion nor the debt collector provides any explanation of why this might be important. It is true the measure of damages in an FDCPA suit does not include rescission of the contract or excusing the debt. However, the consumers never pled that as an element of damages. A second possible implication is that the subjective

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[2] When a debt collector is a lawyer, it imposes obligations on the consumers and additional burdens on the debt collector, such as warning unrepresented consumers they are dealing with a lawyer. This opens the question of whether the dissent in *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997) had the better argument.

intent of the consumers in filing an FDCPA suit is in some way relevant. The notion has no statutory support. Every suit alleging a debt collector has misrepresented the amount of the debt will necessarily involve a consumer's dispute of the debt. Further, the notion has no factual basis in the case at bar. The money from the PI case was gone and the complaint alleged the violation the consumers warned the debt collector it was committing. The third possibility is the debt collector can blindly follow the creditor's orders after it has been warned the contract does not impose the obligation sought. Intransigence is an unfair practice.

The debt collector next claims *Heintz* is distinguishable because it addressed the issue of "whether the term 'debt collector' in the [ ] FDCPA applied to a lawyer who 'regularly,' *through litigation* tries to collect consumer debts." Respondent's Brief pg. 7. The debt collector then provides no explanation for how that legal principal does not encompass the application of the FDCPA "to a lawyer ... no [is acting as a debt collector]" sending dunning letters prior to suit being filed. *Heintz* is distinguishable only to the extent the case at bar lacks an issue of the FDCPA's applicability. This case falls squarely in the heartland of conduct covered by the Act. The debt collector's claim is simply a reiteration of the notion that, as a lawyer, the debt collector in question does not even have to meet the FDCPA standards, which issue was undoubtedly laid to rest in *Heintz*.

The debt collector then claims the Eighth Circuit only resolved a factual dispute. Such a notion is untenable, as summary judgment will only enter when the undisputed facts show the moving party should prevail. The case at bar is on all-fours with *Heintz* except that any fact with even the potential to create a legal issue as to the applicability of the FDCPA has been removed.

In the preceding sections of the Respondent's brief, it repeats a fundamentally flawed view of the Act. It defends Heintz's conduct on the theory Jenkins could not show the debt collector intentionally misrepresented the consumer's obligation under the contract nor that Heintz knew of the misrepresentation. The Act imposes no such burden on consumers. The Act bars any false representation as to the amount of the debt, period. 15 U.S.C. § 1692e(2)(A); *Randolph v. IMBS, Inc.*, 386 F.3d 726, 730 (7th Cir 2004). It is only when a debt collector admits the violation occurred and holds up its burden to prove a *bono fide* error that the debt collector's lack of intent may excuse the violation. 15 U.S.C. § 1692k(c). After a consumer warns a debt collector of a violation and it persists, the universe of issues shrinks to a point, did the violation occur.

The debt collector closes the first section of its brief by seeking to distinguish three cases the consumer's relied on. The problem is the consumers relied on four cases. The case the debt collector wishes to ignore establishes that, once a healthcare provider agrees to treat an individual covered by government health insurance, it has no choice but to bill the insurer. That case exposes the error in the debt collector's assertion the remaining three cases can be distinguished just because the healthcare provider billed the government insurance. The remaining three cases address the issue underlying the consumer's FDCPA suit, to-wit: when a third-party's negligence results in injury to a consumer covered by Medicaid, what interest in the settlement is subordinated, assignable or attachable.

The case the debt collector does not wish to discuss is *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997). In *Barney*, consumers advanced the proposition that a healthcare provider could not refuse to treat individuals covered by Medicaid. The would-be patients claimed that,

since there was a delay between providing the service and billing or receiving payment, the Equal Opportunity Credit Act (EOCA) precluded discriminating against those covered by government health insurance. The Sixth Circuit reasoned that, as the healthcare provider had no choice but to bill the government insurance scheme and the patient had no obligation to pay, there was no extension of credit thus the EOCA never came into play. *Barney, supra*. The creditor could have refused to admit the consumer. However, having admitted the consumer, the creditor does not enjoy the power to unilaterally change the terms of the contract under which the admission occurred.

Without waiver, the courts that have addressed the issue of the scope of a Medicaid patient's assignable or attachable interest in a tort settlement define it as the portion of the settlement attributable to medical expenses. It is true the three cases involve instances where Medicaid was billed, however, as with the case at bar, each involves a consumer covered by Medicaid who anticipates a tort settlement a healthcare provider is chasing. This case is simply the necessary extension to the last stop on the rail line. By making it a felony to charge anyone more than Medicaid would pay, Congress designated the stop.

The State of Florida decided it would be a good idea to attempt to collect from tort victim's the entire sum a healthcare provider billed the State, regardless of what the State actually reimbursed the healthcare provider. *Mallo v. Public Health Trust of Dade Co., Fla.*, 88 F.Supp.2d 1376 (S.D. Fla. 2000). The State action was in excess of Medicaid's statutory grant of authority and actionable under 42 U.S.C. § 1983. *Ibid.* The State of Arkansas tried to collect everything it had actually paid even though the fund it was attaching represented payments for elements of damages beyond the medical expenses. *Arkansas Dept. of Health and*

Human Services v. Ahlborn, --- U.S. ---, 126 S.Ct. 1752 (2006). This court held the fund was only liable to repay Arkansas to the extent the monies represented reimbursement to the consumer for the medical expenses. *Ibid.* A private healthcare provider extracted from a tort victim a confession, in open court, to a lien for the entire amount billed; it billed Medicaid; and, in an action not involving the State, sought to enforce the unpaid balance of the lien. *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005). The Sixth Circuit held that the sequence of events was extraneous and the healthcare provider could not expect a greater payment than that which Medicaid made. *Ibid.* The case at bar is the final extension of the progression, as the healthcare provider cannot choose who to bill after it elects to provide treatment, *Barney*, and, as the healthcare provider is bound by the terms of the insurance contract under which it provided treatment, it cannot weasel out. Congress declared it to be a felony to try and weasel out. 42 U.S.C. § 1320a-7b(d)(1).

It is an abusive collection practice to seek payment from one who does not have an obligation to repay the debt. It is an abusive collection practice to seek payment in excess of the consumer's obligation to a creditor. There is no special excuse applicable to lawyers. There is no conceivable reason why the FDCPA does not extend to a professional debt collector continuing to aid and abet a creditor's felonious billing practice after it has been warned the creditor is a scoundrel.

Respectfully Submitted,

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